DOREE INDUSTRIES (M) SDN BHD & ORS A

v.

SRI RAM & CO & ORS

HIGH COURT MALAYA, IPOH B
BALIA YUSOF J
[CIVIL SUIT NO: 22-264-1999]
6 DECEMBER 2006

CIVIL PROCEDURE: *Costs - Security for costs - Security for costs against company - Principles - Company in liquidation and its directors declared bankrupts - Whether justifying order for security for costs - Grant of sanction by Insolvency Department - Whether an irrelevant factor - Companies Act 1965, s. 351(1) - Rules of High Court 1980, O. 23* C D

These were appeals against the decision of the learned Deputy Registrar ordering the first, second and third plaintiffs herein to pay security for costs in the sums of RM20,000, RM10,000 and RM10,000 respectively on their claims against the defendants ('the orders'). The facts were that a fire had broken out at the first plaintiff's premises, whereof claims were filed by the plaintiffs against the insurers, the legal advisor of the insurers and the investigators appointed to investigate the losses and cause of fire. Subsequently, however, the first plaintiff went into liquidation whilst the second and third plaintiffs, the directors of the first plaintiff, were declared bankrupts. In the circumstances that arose, the defendants applied for and were granted the orders pursuant to s. 351(1) of the Companies Act 1965 ('Companies Act') and O. 23 Rules of the High Court 1980 ('RHC'). The plaintiffs appealed and argued, firstly, that the orders were unjustified as the first plaintiff had already paid RM2,000 as security for costs to the Jabatan Insolvensi, and secondly, that the quantum ordered was inordinately high considering the plaintiffs' impecuniosity. The defendants retorted that the orders ought to be sustained as the plaintiffs were clearly unable to pay the costs if the defendants were to succeed, and further, there was due compliance with O. 23 RHC as the second and third plaintiffs had, in the processes below, given different addresses at different times to the court. E F G H I

Held (dismissing the appeals):

(1) Section 351 of the Companies Act provides for a two-stage inquiry in the process of arriving at the conclusion as to whether security for costs should be awarded in which the plaintiff is a company, namely, whether there is credible evidence and if so whether such evidence supports the belief that the company is unable to pay the costs of a successful defendant. On the facts, there is credible evidence and that evidence supports the belief that the first plaintiff will be unable to pay the costs of the defendants. The onus therefore is on the plaintiff to satisfy the court why security for costs should not be ordered. (paras 8, 11 & 12)

(2) The first plaintiff had not discharged the burden cast upon them. The fact that they had paid RM2,000 as security for costs to the Jabatan Insolvensi is no ground for not ordering security for costs. Further, their plea that they should not be further burdened with security for costs on account of their impecuniosity is an admission that they would not be able to pay costs if ordered. (paras 12 & 14)

(3) Order 23 r. 1 RHC is not a *carte blanche* provision empowering the court to order security for costs in all cases where the plaintiff's address is not stated in the writ or other originating process or is incorrectly stated. To grant the order the court must have regard to all the circumstances of the case and would only do so if it thinks it is just to do so. In this case, notwithstanding that there was no plausible explanation on the usage of the different addresses, there was no evidence that the plaintiffs had been changing addresses in order to evade the consequences of litigation. Further, having different addresses *per se* is not a ground envisaged under O. 23 RHC. (para 18)

(4) In all, ten applications for security for costs had been made against each of the plaintiffs. Consequently, considering the sums ordered to be paid, the first plaintiff will have to fork out RM200,000, whilst the second and third plaintiffs will have to provide RM100,000 each. The hefty sums notwithstanding, the plaintiffs' claim runs into millions of ringgit and there are four other suits between the parties. There are also numerous

other interlocutories still pending. In the circumstances, the amount of RM20,000 ordered against the first plaintiff and RM10,000 each against the second and third plaintiffs is reasonable and should not be disturbed. (paras 21 & 24)

(5) The plaintiffs' impecuniousity is not per se a sufficient ground for making an order for costs. Nevertheless, this is a proper case for the court to exercise its discretion by ordering security for costs against the plaintiffs. The decision of the Deputy Registrar is thus affirmed. (para 20)

Case(s) referred to:

Ashin Sdn Bhd v. Datuk Bandar Kuala Lumpur & Ors [1999] 4 CLJ 115 HC ***(refd)***

Faridah Begum Abdullah v. Dato Michael Chong [1995] 2 CLJ 951 HC ***(refd)***

Goldquest International Ltd v. Teh Leong Kiat [2003] 2 CLJ 402 HC ***(foll)***

Government of Sarawak v. Sami Mousawi Utama Sdn Bhd [1998] 4 CLJ 175 HC ***(refd)***

Gula Perak Bhd v. Agri-Projects (M) Sdn Bhd [1989] 1 MLJ 422 ***(refd)***

KD Resources Sdn Bhd v. Ng Boon Jieh & Son Realty Sdn Bhd & Anor [2003] 1 CLJ 333 HC ***(refd)***

Keary Developments Ltd v. Tarmac Construction Ltd & Anor [1995] 3 All ER 534 ***(refd)***

New Zealand Insurance Co Ltd v. Ong Choon Lin [1992] 1 MLJ 85 ***(refd)***

Porzelack KG v. Porzelack (UK) Ltd [1987] 1 All ER 1074 ***(refd)***

Procon (Great Britain) Ltd v. Provincial Building Co Ltd & Another [1984] 1 WLR 557 ***(foll)***

Re Unisoft Group Ltd (No 2) [1993] BCLC 532 ***(refd)***

Sir Lindsay Parkinson & Co Ltd v. Triplan Ltd [1973] 2 All ER 273 ***(refd)***

Skrine & Co v. MBf Capital Bhd [1998] 3 CLJ 432 CA ***(foll)***

Strukturmas (Selangor) Sdn Bhd v. Majlis Perbandaran Petaling Jaya [2001] 3 MLJ 344 ***(refd)***

Thune & Anor v. London Properties Ltd & Ors [1990] 1 All ER 972 ***(refd)***

Tradestock Private Ltd v. TNT (Management) Private Limited & Ors ALR 52 ***(refd)***

Legislation referred to:

Companies Act 1965, s. 351(1)

Rules of the High Court 1980, O. 23 r. 1, O. 92 r. 4

Companies Act [Aust], ss. 351, 363(1), 447

For the plaintiffs - Ahmad Yani Aminuddin (Ngan Siong Hing & Ridzuan with him); M/s Abbas & Ngan
For the 1st defendant - Muhammad Faizal Moideen; M/s Shook Lin & Bok
For the 2nd defendant - Jack Yow; M/s Shearn Delamore & Co

Reported by WA Sharif

JUDGMENT

Balia Yusof J:

[1] Altogether five appeals were filed in this suit, four by the first, second and third plaintiffs (encls. 153, 154, 155 and 156) and one by the fourth defendant (encl. 162) against the decision of the learned Timbalan Pendaftar given on 24 November 2005. The first four appeals by the first, second and third plaintiffs are against the order whereby the first, second and third plaintiffs were ordered to deposit in court a sum of RM20,000, RM10,000 and RM10,000 respectively as security for costs. While the appeal in encl. 162 is by the fourth defendant contending that the amount of security ordered by the learned Timbalan Pendaftar was inadequate and ought to be increased.

[2] Together with the above, four other suits were heard together namely suits numbers 22-265-99, 22-266-99, 22-267-99 and 22-28-00.

[3] There are two appeals in suit 22-265-99 *vide* encls. 121 and 122, another two appeals in suit 22-266-99 *vide* encls. 116 and 117 and one appeal each in suit numbers 22-267-99 and 22-80-00 *vide* encls. 110 and 39 respectively. All the 6 appeals in these other four suits are filed by the first, second and third plaintiffs against the same order of the Timbalan Pendaftar made on 24 November 2005 allowing the different defendant's application for security for costs against the first, second and third plaintiffs.

For ease of reference the various suits referred to above are tabulated as follows:

Suit No.	Plaintiffs	Defendants
22-264-99	1. Doree Industries (M) Sdn. Bhd. 2. Wong Kong Heow 3. Sam Chee Yean 4. Patrick Foo Kit Sin	1. Sri Ram & Co., 2. Thomas Howell Group (M) Sdn. Bhd. 3. Forensic Services (M) Sdn. Bhd. 4. Aetna Universal Insurance Berhad
22-256-99	1. Doree Industries (M) Sdn. Bhd. 2. Wong Kong Heow 3. Sam Chee Yean 4. Patrick Foo Kit Sin	1. Sri Ram & Company 2. Thomas Howell Group (M) Sdn. Bhd. 3. Forensic Services (M) Sdn. Bhd. 4. MBF Insurance Bhd.
22-266-99	1. Doree Industries (M) Sdn. Bhd. 2. Wong Kong Heow 3. Sam Chee Yean 4. Patrick Foo Kit Sin	1. Sri Ram & Company 2. Thomas Howell Group (M) Sdn. Bhd. 3. Forensic Services (M) Sdn. Bhd. 4. Arab Malaysia Assurance Bhd.
22-267-99	1. Doree Industries (M) Sdn. Bhd. 2. Wong Kong Heow 3. Sam Chee Yean 4. Patrick Foo Kit Sin	1. Sri Ram & Company 2. Thomas Howell Group (M) Sdn. Bhd. 3. Forensic Services (M) Sdn. Bhd. 4. Mayban Assurance Bhd.
22-28-00	1. Doree Industries (M) Sdn. Bhd. 2. Wong Kong Heow 3. Sam Chee Yean 4. Patrick Foo Kit Sin	Mayban Assurance Bhd.

[4] The application for security for costs against the plaintiffs is made pursuant to the provisions of s. 351(1) of the Companies Act 1965 and O. 23 of the Rules of the High Court 1980. The fourth defendant has also cited O. 92 r. 4 of the same rules in the application.

Facts Of The Case

[5] A fire broke out in the premises of the first plaintiff and arising from that claims were made against the fourth defendant as insurers. The first defendant is the legal advisor to the insurers while the second and third defendants are the investigators appointed to investigate the losses and the cause or causes of the fire. The plaintiffs have filed a claim against the defendants seeking for damages, the value of the insured sum, injunction and certain declaration in this suit as well as in four other suits all at the Ipoh High Court. The second and third plaintiffs are the directors of the first plaintiff and it is against these three plaintiffs that the defendant is asking for security for costs. The fourth plaintiff is the Manager of the first plaintiff and is not involved in this application.

[6] The first plaintiff has been wound up on 12 March 2001 and a sanction was given by the Jabatan Insolvensi on 1 April 2004 under the provisions of the Companies Act 1965 for it to proceed with the claim. The second and third plaintiffs were declared bankrupt on 12 March 2002 and 29 January 2002 respectively and still remain so at the time of the application by the defendants. It is noted in granting the sanction, the Jabatan Insolvensi has asked for a sum of RM2,000 to be deposited as security for costs for all the five suits filed by the plaintiffs.

Against The First Plaintiff

[7] The application for security for costs against the first plaintiff is made pursuant to s. 351(1) of the Companies Act 1965 which provides:

> Where a company is a plaintiff in any action or other legal proceeding the court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs and stay all proceedings until the security is given.

[8] In interpreting the abovementioned provision the Court of Appeal in *Skrine & Co v. MBf Capital Bhd* [1998] 3 CLJ 432 at p. 444 noted that:

> As may be seen, and this is borne by the authorities decided upon the parallel provisions in other common law jurisdictions, the section provides for a two stage inquiry in the process of arriving at the conclusion as to whether security for costs should be awarded in a particular case in which the plaintiff is a company. The first step is for the court hearing an application in this regard to determine whether there is credible evidence. The second step is to ascertain whether that evidence, where found to be credible, supports the belief that the company will be unable to pay the costs of a successful defendant.

[9] It is without doubt that the power to order security for costs lies at the discretion of the court and it is simply a discretion which ought to be exercised in all the circumstances of the case. In exercising its discretion, the court had to balance the threat that an impecunious company could put unfair pressure on a defendant against the wrong that would be caused to a company which was successful and should not have borne any costs at all (*Re Unisoft Group Ltd. (No. 2)* [1993] BCLC 532). Smithers J in *Tradestock Private Ltd. v. TNT (Management) Private Limited & Ors* 14 ALR 52 at p. 56 in expressing his views on s. 363(1) of the Australian Companies Act which is identical with our s. 351 and is in *pari materia* with the English s. 447 states:

> It is clear, however, that the real problem is to determine whether, in the circumstances of that case, the court ought to take the view that the protection should not be afforded to the defendant. No doubt the answer is to be found by ascertaining where, on considerations of what is just and reasonable, the balance rests between the risk of exposing an innocent defendant to the expense of defending his position and the risk of unnecessarily shutting out from relief a plaintiff whose case if litigated would result in his obtaining that relief.

[10] To add to the list of authorities, reference must also be made to *Sir Lindsay Parkinson & Co Ltd v. Triplan Ltd* [1973] 2 All ER 273, [1973] QB 609 and *Keary Developments Ltd. v. Tarmac Construction Ltd & Anor* [1995] 3 All ER 534 which were extensively dealt with by my learned brother Ian Chin J in *Government of Sarawak v. Sami Mousawi Utama Sdn. Bhd.* [1998] 4 CLJ 175.

[11] Having considered the facts before me and the evidence adduced, I have no hesitation is coming to the conclusion that there is credible evidence and that credible evidence supports the belief that the first plaintiff will be unable to pay the costs of the defendants. The status of the first plaintiff is proven and readily admitted by counsel. Abdul Malik Ishak J in *KD Resources Sdn Bhd v. Ng Boon Jieh & Son Realty Sdn. Bhd. & Anor* [2003] 1 CLJ 333 at p. 337 stated:

> According to Jessel MR in *Northampton Coal, Iron & Waggon Company v. Midland Waggon Co* [1878] 7 Ch D 500, 503, the fact that the company was in liquidation would be sufficient reason to believe that the assets of the company would be insufficient to pay for the costs of the proceedings.

[12] Once it is established that it will be unable to pay the costs, the onus is on the plaintiff to satisfy the court why security for costs should not be ordered. (See: *Gula Perak Bhd v. Agri-Projects (M) Sdn. Bhd* [1989] 1 MLJ 422). In the instant case, it is established and admitted that the first plaintiff is in liquidation. Accordingly it is for plaintiff to satisfy the court why security for costs should not be ordered. The affidavit in reply was filed by the former Managing Director of the first plaintiff who is also named as the second plaintiff in the case. My perusal of the said affidavit (encl. 126) does not indicate sufficient grounds to satisfy the court why security for costs should not be ordered. The fact that the first plaintiff has paid RM2,000 as security for costs to the Jabatan Insolvensi is insufficient ground why security for costs should not be ordered. His plea that the first plaintiff is in liquidation and that the other two plaintiffs are bankrupts and therefore should not be further burdened by ordering security for costs clearly is an admission that the first plaintiff are unable to pay the costs. Further, I do not see how an application for security for costs in the instant case could be an abuse of the court's process. The plaintiff has failed to give sufficient evidence to show how it would be prejudiced by the said application. There is not an iota of evidence that can tilt the scale in their favour and there is also nothing in the affidavit to indicate that the plaintiff would as a result of this order suffer injustice or that it would stifle its claim or that the order would be oppressive. Worse still, there is nothing in the affidavit in reply to show its ability to pay the costs in the event it were to fail in its claim against the defendants.

[13] As observed by Kamalanathan Ratnam J in *Strukturmas (Selangor) Sdn. Bhd. v. Majlis Perbandaran Petaling Jaya* [2001] 3 MLJ 344, "it is important that when an application is made by a party for security for costs against another, the opposing party must state affirmatively that it would be in a position to pay the taxed cost preferably with supporting documents showing its ability to pay the costs. In this case the plaintiff has maintained a discreet silence. The only inference the court can draw is that the plaintiff was unwilling to put in print its admission of its inability to pay the taxed costs."

[14] In the light of the above circumstances, I hold that the first plaintiff has failed to discharge the burden cast on it to satisfy the court why an order for security for costs ought not to be made.

Against The Second And Third Plaintiffs

[15] Against the second and third plaintiffs, the defendant has cited O. 23 r. 1 and O. 92 r. 4 of the High Court Rules 1980 for an order for security for costs to be made. The relevant parts of O. 23 upon which the application is premised are as follows:

> I. Security for costs of action, etc.
>
> (1) Where on the application of a defendant to an action or other proceeding in the High Court, it appears to the court -
>
> (a) ...
>
> (b) ...
>
> (c) subject to paragraph (2), that the plaintiffs address is not stated in the writ or other originating process or is incorrectly stated therein; or
>
> (d) that the plaintiff has changed his address during the course of the proceedings with a view to evading the consequences of the litigation,
>
> then, if, having regard to all the circumstances of the case, the Court thinks it just to do so, it may order the plaintiff to give such security for the defendant's costs of the action or other proceeding as it thinks just.

A (2) The Court shall not require a plaintiff to give security by reason only of paragraph (1)(c) if he satisfies the Court that the failure to state his address or the mis-statement thereof was made innocently and without intention to deceive.

(3) ...

B

[16] The defendant has stated in the affidavit in support of the application that both the second and third plaintiffs have given different address at different times. At the time of the filing of the writ the address of both the second and third plaintiffs were the C same namely at No. 84, Persiaran Kledang Timur 19, Bandar Baru Menglembu, 31450 Ipoh Perak. The second plaintiff has two other different addresses which the defendant obtained from the official search at the Jabatan Insolvensi and also from the affidavit filed by him on 10 March 2000. Similarly, the third plaintiff too, D following a search done at CTOS Sdn Bhd has a different address in Ipoh, two other different addresses in Kuala Lumpur and one other address in Selangor.

[17] Wong Kong Heow, the second plaintiff affirmed an affidavit E on 21 August 2004 (encl. 126) on behalf of the plaintiffs in the application and merely reiterated that the different addresses of the second and third plaintiffs are their relevant addresses at the relevant period of time when the documents were filed by them. There is an admission by the plaintiffs that they do in fact have F those different addresses. Other than admitting those addresses, the plaintiff contend that having different addresses is not relevant and is not a ground to support the defendant's application for security for costs.

[18] It is to be noted that O. 23 r. 1 of the Rules of the High G Court is not a *carte blanche* provision empowering the court to order security for costs in all cases where the plaintiff's address is not stated in the writ or other originating process or is incorrectly stated.

H To order for security under the said rule the court must have regard to all the circumstances of the case and that the court thinks it is just to do so. Having different addresses *per se* is not a ground as envisaged under O. 23 and there is no evidence to suggest that the plaintiffs have been changing addresses to evade I the consequence of the litigation. It is also not suggested that the

plaintiffs' address in the writ is incorrectly stated. In the same token there was also no plausible reason or explanation given by the plaintiffs to the existence or usage of the different addresses.

[19] Both the second and third plaintiffs have been declared bankrupts and I can understand the defendant's apprehension over the plaintiffs' ability to meet any order as to costs which the court may make. However, it is trite that the plaintiffs' impecuniousity by itself is not a sufficient ground for the court to make an order for security for costs. Arifin Zakaria J (as he then was) in *Faridah Begum bt. Abdullah v. Dato Michael Chong* [1995] 2 CLJ 951 cited a passage by Bingham CJ in *Thune & Anor v. London Properties Ltd. & Ors* [1990] 1 All ER 972 at p. 979:

> In approaching that question, it cannot be to emphatically stated that impecuniosity of a personal plaintiff is never of itself enough to confer on the court a discretion to order security. It is not a ground in Order 23, Rule 1(1), and Section 726(1) of the Companies Act 1985, like its predecessor, only applies to limited companies. But I am for my part firmly of opinion that it is a matter which the court may, and in a proper case should, consider in exercising a discretion where power to make an order is established.

[20] Having considered all the circumstances of the case, I am of the view that this is a proper case for this court to exercise its discretion in ordering security for costs against the plaintiffs. The decision of learned Timbalan Pendaftar ordering the second and third plaintiffs to provide security for costs is hereby affirmed.

Quantum

[21] I shall now consider the issue of the amount of security that ought to be ordered against the plaintiffs. The learned Timbalan Pendaftar has ordered the sum of RM20,000 against the first plaintiff and RM10,000 against each of the second and third plaintiffs. The said amount is against each of the applicant and in its totality the first plaintiff will have to fork out RM200,000 against the ten applications while the second and third plaintiff will each have to provide RM100,000 as security for all the ten applications filed against them.

[22] The amount of security for costs to be ordered by the court certainly depends on the facts and circumstances of each case. The security to be ordered should be such as the court thinks in all the circumstances of the case is just. The quantum imposed must not be oppressive upon the plaintiff and it is always a matter that ought to be taken into account that any plaintiff should not be driven from the judgment seat unless the justice of the case makes it imperative.

The court must always be reluctant to allow applications for security for costs to be used as a measure to stifle proceeding or for some other oblique motives. (*Ashin Sdn. Bhd. v. Datuk Bandar Kuala Lumpur & Ors* [1999] 4 CLJ 115. *Porzelack KG v. Porzelack (UK) Ltd* [1987] 1 All ER 1074). Speaking of the court's discretion to allow security for costs, Sir Donald Nicholls V-C in *Re Unisoft Group Ltd. (No. 2) (supra)* listed several factors that have weighed with him and at p. 536 of the report His Lordship said:

> Fifthly, the jurisdiction conferred by the statute does not require the court either to award security in a sum equal to the anticipated costs or to make no award at all. It is not a case of either all or nothing. The discretion is wide enough to permit the court to award a sum in between these two extremes if justice and fairness so require. The court has power to order security in full amount of the anticipated costs. The greater includes the less. The court may order a lesser sum.

[23] Abdul Malik Ishak J in *Goldquest International Ltd. v. Teh Leong Kiat* [2003] 2 CLJ 402 had an occasion to deal with the English Court of Appeal case of *Procon (Great Britain) Ltd. v. Provincial Building Co. Ltd. & Another* [1984] 1 WLR 557 on the issue of amount of security and the court's views on the UK Supreme Court Practice 1982 on this subject matter. In conclusion, His Lordship at p. 420 of the report had this to say:

> Thus, applying the case of *Procon (Great Britain) Ltd. v. Provincial Building Co. Ltd. and Another (supra)* as best as I can, I must say that:
>
> (1) the UK Supreme Court Practice 1982 which recommended a "skeleton bill of costs" should be taken with a pinch of salt since Stephen Brown LJ had suggested its removal;

(2) it is the court that will ultimately fix the quantum for security for costs as the court thinks in all circumstances of the case to be just; and it is for the defendant to put before the court sufficient material to enable the court to decide the quantum for the security for costs.

[24] I fully associate myself with the views expressed therein. Reverting to the fact and circumstances of the case before me, the four defendants has sought for security for costs against the first, second and third plaintiff in the sum of between RM250,000 and RM300,000. The fourth defendant solicitors have also put up a draft bill of costs for RM250,000. The plaintiffs' claim in this suit runs in the millions of ringgit and there are four other suits between the parties. The first plaintiff is in liquidation while the second and third plaintiffs are bankrupts. There are numerous other interlocutories still pending in court and likewise a similar situation in the other four suits. Although a sum of RM2,000 has been ordered as security for costs by the Jabatan Insolvensi against the first plaintiff, this sum is far too low in the circumstances of the case. In any event it is meant for the Jabatan Insolvensi and it is not a security for costs for the defendant applicants in the instant case. I fully agree with the learned Timbalan Pendaftar that the amount of between RM250,000 to RM300,000 sought for by the defendant is excessive and would be oppressive to the plaintiffs as they are and considering further of the number of applications filed by the different defendant against them. In the light of those circumstances, I am of the view that the amount of RM20,000 ordered by him against the first plaintiff and RM10,000 against each of the second and third plaintiffs as security for costs is a reasonable amount. I see no valid reason for me to interfere with the exercise of discretion by the learned Timbalan Pendaftar in arriving at the figure. It is trite law that an appellate court will not interfere in the exercise of discretion by the lower court unless such exercise of discretion had been premised on wrong grounds (See: *New Zealand Insurance Co. Ltd. v. Ong Choon Lin* [1992] 1 MLJ 85.)

[25] Accordingly the appeal by the first, second and third plaintiffs against the order of the Timbalan Pendaftar is hereby dismissed with costs. The appeal by the fourth defendant in encl. 162 is also costs. The appeal by the fourth defendant in encl. 162 is also dismissed with costs and so do the six other appeals in the other suits.